IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	CRIMINAL NO. 03-555
	:	
	:	
JOHN VITILLO, ET AL.	:	

SURRICK, J. **APRIL 29, 2005**

MEMORANDUM & ORDER

Presently before this Court is the Motion of Defendants John Vitillo, Vitillo Corporation, and Vitillo Engineering, Inc., for a new trial pursuant to Federal Rule of Criminal Procedure 33(a) (Doc. No. 79). For the following reasons, Defendants' Motion will be denied.

I. BACKGROUND

On August 28, 2003, John Vitillo, Vitillo Corporation, and Vitillo Engineering, Inc. were indicted on three counts in violation of 18 U.S.C. § 666(a)(1)(A) for theft from a program receiving federal funds. (Doc. No. 1.) The Government filed a superseding indictment on May 18, 2004, which added a count against the Defendants for conspiracy in violation of 18 U.S.C. § 371. (Doc. No. 26.) On July 13, 2004, the Government filed a second superseding indictment which contained the same conspiracy and theft counts as the prior superseding indictment plus facts related to sentencing.[1] (Doc. No. 36.) After a jury trial, each Defendant was found guilty on all charges.

[1]The second superseding indictment was in response to *Blakely v. Washington*, 124 S. Ct. 2531 (2004).

On June 19, 2002, at 12:30 p.m., ten government agents, including Federal Bureau of Investigation ("FBI") Agent Thomas Neeson ("Agent Neeson"), executed a federal search warrant at the offices of Vitillo Corporation and Vitillo Engineering, Inc. In addition to obtaining various records, Agent Neeson told Defendant John Vitillo that he would like to discuss with him the billing practices of Vitillo Corporation and Vitillo Engineering, Inc. regarding work performed at the Reading Regional Airport. The Government contends that during the subsequent interview Defendant Vitillo made several inculpatory statements.[2] No pretrial motions were filed by Defendants related to this interview. Steven G. Welz, Esq., an attorney who represented Vitillo, was present during most of the interview. Welz testified for Defendants at trial, indicating that Vitillo was not particularly articulate in answering Agent Neeson's questions; however, he disagreed with the Government's assertion that Vitillo had made incriminating statements. Assistant United States Attorney ("AUSA") Robert E. Goldman and his co-counsel AUSA Kathleen Rice were both present during the interview. During the Government's opening statement, AUSA Goldman made reference to the asserted confession that Vitillo had made during the June 19 interview. At this point, counsel for Defendants objected to any statements made or evidence offered regarding the presence of AUSA Goldman or his co-counsel during the Vitillo interview. Prior to trial, Defendants did not file a motion in limine seeking to exclude this evidence or seeking disqualification of trial counsel. Rather, counsel waited until after the jury had been sworn and counsel for the Government was making his opening statement to raise the issue. During the trial, Agent Neeson and Defendant Vitillo both testified that Goldman and Rice were both present during the June 19 interview.

[2]The interview was not tape recorded.

In the instant Motion, Defendants point to five remarks which they assert were made by the Government that entitle them to a new trial: (1) counsel for the Government noted in his opening statement to the jury that he and his co-counsel were present during an alleged confession of Defendant John Vitillo (Doc. No. 79 ¶ 2); (2) counsel for the Government noted during his direct examination of Agent Neeson that he and his co-counsel were present during an alleged confession of Defendant John Vitillo (*id.* ¶ 3); (3) counsel for the Government noted during his cross-examination of Defendant John Vitillo that he and his co-counsel were present during Vitillo's alleged confession (*id.* ¶ 4); (4) when counsel for the Government cross-examined Vitillo, he mentioned an off-the-record proffer made by Vitillo and stated that Vitillo failed to explain the Defendants' billing practices regarding the Reading Regional Airport project (*id.* ¶ 10); and (5) counsel for the Government made improper reference to Vitillo's Fifth Amendment right not to testify (*id.* ¶ 13). Defendants assert that their counsel made timely objections to each of these statements. (*Id.* ¶¶ 6, 11, 14.)

II. LEGAL STANDARD

In reviewing the merits of a motion for new trial, we "may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). "'The decision whether to grant a motion for a new trial under Rule 33 is committed to the sound discretion of the trial court, which may set aside the verdict and order a new trial if it ascertains that the verdict constitutes a miscarriage of justice'" such that there is a serious danger that an innocent person was convicted. *United States v. Broadus*, Crim. No. 04-61, 2004 U.S. Dist. LEXIS 22189, at *5-6 (E.D. Pa. Nov. 2, 2004) (quoting *United States v. Guadalupe*, Crim. No. 01-429-01, 2003 U.S. Dist. LEXIS 12263, at *1 (E.D. Pa. June 18, 2003)); *see also United States v. Rich*, 326 F. Supp.

2d 670, 673 (E.D. Pa. 2004). A district court also "must grant a new trial if errors occurred during the trial, and it is reasonably possible that such error, or combination of errors, substantially influenced the jury's decision." *Rich*, 326 F. Supp. 2d at 673 (citing *United States v. Copple*, 24 F.3d 535, 547 n.17 (3d Cir. 1994)).

III. LEGAL ANALYSIS

A. Pleading Defects in Defendants' Motion for New Trial

Initially, we note that under Local Rule of Criminal Procedure 47.1, a post-trial motion for new trial filed pursuant to Federal Rule of Criminal Procedure 33 "shall be supported by memoranda filed within the time provided by such rule[], or such additional time as the Court shall allow." Local R. Crim. P. 47.1. Defendants filed the instant Motion within the time period prescribed by Rule 33. However, they failed to file a supporting memorandum of law pursuant to Local Rule 47.1. Therefore, each ground on which the Motion is based may be summarily rejected. *United States v. Granero*, Crim. No. 91-578-1, 1992 U.S. Dist. LEXIS 3564, at *7 (E.D. Pa. Mar. 19, 1992) (citing *United States v. Martorano*, 541 F. Supp. 1226, 1227 (E.D. Pa. 1982)).[3]

Although Defendants assert that the Court erred in ruling on their objections, Defendants fail to explain why the Court's rulings were erroneous. Instead, Defendants merely cite two cases that address the issue of vouching. Defendants cite *United States v. Molina-Guevara*, 96 F.3d 698 (3d Cir. 1996), where the Third Circuit held that the district court should have granted a mistrial because of improper vouching by the government in its closing remarks. *Id.* at 699. In

[3]The *Granero* and *Martorano* courts cite Local Rule of Criminal Procedure 14, which was superseded by Rule 47.1.

an attempt to bolster the testimony of a customs agent, the prosecutor in *Molina-Guevara* represented to the jury that a certain customs investigator would have supported the agent's version of events if he had testified, and that the agent did not lie on the stand. *Id.* at 704. The Third Circuit explained that "the combined effect was to suggest that the prosecutor knew more than the jury had heard and that it should be willing to trust the government's judgment. It follows that the prosecutor's comments violated our rule against vouching." *Id.* at 704-05.

Defendants also cite *United States v. Jones*, Crim. No. 95-124-5, Civ. A. No. 99-3976, 2001 U.S. Dist. LEXIS 15853 (E.D. Pa. Oct. 4, 2001), in which the District Court concluded that the government improperly vouched for three police officers during its closing argument. *Id.* at *20-21. The prosecutor in *Jones* implied that the three police officers who testified had a duty to provide candid testimony because they would "'put their careers on the line'" if they were not truthful. *Id.* at *16 (citing Tr. 7/16/96 at 41.) The court noted that "the essence of improper vouching is not the espousal of a view that a witness is being truthful, but rather the explicit or implicit assertion of some extra-evidentiary source for this view." *Id.* at *18-19. While these cases detail the law to be applied when it is alleged that improper vouching has occurred, Defendants have failed to enlighten us as to how these cases apply to the instant matter.

In addition, Defendants did not order the transcript of the trial proceedings. They therefore cannot cite to any portion of the trial record in support of their Motion. "In the absence of a specific citation to the trial record, judicial review of [Defendants'] contention[s] is not practicable." *United States v. Polishan*, Crim. No. 96-274, 2001 U.S. Dist. LEXIS 10662, at *42 n.7 (E.D. Pa. July 27, 2001); *see also Dranow v. United States*, 307 F.2d 545, 572 (8th Cir. 1962) ("Absent error specifically pointed to, a court of review has the duty to fall back on the benign

and ever-present presumption that a losing party has had a fair and impartial trial . . . ."). In *United States v. Gehl*, 93-CR-300, 1995 U.S. Dist. LEXIS 1666 (N.D.N.Y. Feb. 2, 1995), the defendants filed a motion for a new trial alleging that the prosecutor engaged in misconduct during his closing argument. As is the case here, defendants failed to cite to any part of the transcript in support of their argument. Because defendants failed to rely on the record, the United States District Court for the Northern District of New York concluded that "obviously, there can be no finding of prosecutorial misconduct on this basis." *Id.* at *18.

Defendants offer this Court nothing but bald allegations to support their Motion. Motions for new trial "are disfavored and should only be granted sparingly and with great caution." *United States v. Bui*, Crim. No. 03-257, 2004 U.S. Dist. LEXIS 425, at *13 (E.D. Pa. Jan. 9, 2004) (citing *United States v. Brennan*, 326 F.3d 176, 189 (3d Cir. 2003); *United States v. Allen*, 554 F.2d 398, 403 (10th Cir. 1977)). Defendants have made no effort to provide the Court with the ability to review their assertions of error. Nevertheless, we will attempt to evaluate these assertions.

B. Vouching

Defendants contend that a new trial is necessary because of prosecutorial vouching. Vouching is "an assurance by the prosecuting attorney of the credibility of a Government witness through personal knowledge or by other information outside of the testimony before the jury." *United States v. Walker*, 155 F.3d 180, 184 (3d Cir. 1998). A court may only conclude that there is prosecutorial vouching if the defendant shows that: (1) the prosecutor assured the jury that certain testimony of a government witness is credible; and (2) the prosecutor's assurance is based on an explicit or implicit reference to his personal knowledge or other information that is not part

of the record. *Id.* at 187;*see also United States v. Milan* , 304 F.3d 273, 290 (3d Cir. 2002).

In their Motion, Defendants assert that the Government engaged in improper vouching on three occasions during trial: (1) AUSA Goldman noted in his opening statement to the jury that he and his co-counsel were present during an alleged confession of Defendant John Vitillo (Doc. No. 79 ¶ 2); (2) during his direct examination of Agent Neeson, AUSA Goldman elicited testimony that he and his co-counsel were present during Agent Neeson's interview of Defendant Vitillo (*id.* ¶ 3); and (3) during his cross-examination of Defendant Vitillo, AUSA Goldman elicited testimony that he and his co-counsel were present during Vitillo's alleged confession to Agent Neeson. (*Id.* ¶ 4).

In each instance, Defendants have failed to show that counsel for the Government referred to facts that were not in the trial record or that counsel for the Government personally assured the jury that a government witness was reliable. Defendants' theory appears to be that the prosecutor improperly encouraged the jury to draw the inference that because he and his co-counsel were present during Agent Neeson's interview of Defendant Vitillo, the FBI agent's testimony should be believed. Significantly, however, Defendants do not even suggest that counsel for the Government made personal assurances to the jury about the veracity of Agent Neeson's trial testimony or that counsel for the Government made assurances based on the implicit or explicit reference to his personal knowledge or some other information that is not in the record. Clearly, under the two-prong test detailed in *United States v. Walker*, there is no basis upon which to conclude that prosecutorial vouching occurred here. *See Milan*, 304 F.3d at 290 (concluding that defendant failed to establish vouching because he failed "to demonstrate that a representative of the government gave inappropriate personal assurances concerning the

reliability of a witness based on facts not before the jury"); *cf. Molina-Guevara*, 96 F.3d at 704-05 (vouching existed where prosecutor made explicit assurance to jury in closing argument that the government witness "did not lie to you"); *Jones*, 2001 U.S. Dist. LEXIS 15853, at *20 (concluding that prosecutor's statements to jury during closing argument regarding government witnesses constituted vouching).

In addition, Section 3-3.1(g) of the ABA Standards Relating to the Prosecution Function states:

> Unless a prosecutor is prepared to forgo impeachment of a witness by the prosecutor's own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present the impeaching testimony, a prosecutor should avoid interviewing a prospective witness except in the presence of a third person.

ABA Standards for Criminal Justice Prosecution Function and Defense Function § 3-3.1(g) (3d ed. 1993); *see also United States v. Bailin*, No. 89-CR-668, 1990 U.S. Dist. LEXIS 831, at *6-7 (N.D. Ill. Jan. 22, 1990). The ABA Standards do not prohibit a prosecutor from attending an interview conducted by an FBI agent who will later testify regarding that interview. When AUSA Goldman and AUSA Rice attended the initial interview of Vitillo by Agent Neeson, they were not violating the ABA Standards. We reject Defendants' assertion that counsel for the government engaged in improper prosecutorial vouching.[4]

C. Scope of Government's Cross-Examination of Vitillo

Defendants also assert that a new trial is required because the Government pursued an improper line of inquiry while cross-examining Defendant Vitillo. Under Federal Rule of

[4]We note that the jury was instructed that it may only consider evidence offered during the course of the trial, which does not include statements made by counsel, and that they alone should decide whether witnesses were credible.

Evidence 611(b), "[c]ross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of its discretion, permit inquiry into additional matters as if on direct examination." Fed. R. Evid. 611(b). "It is well established that a district court 'has wide discretion in determining the permissible scope of cross-examination.'" *United States v. Gonzalez*, Crim. No. 02-534, 2003 U.S. Dist. LEXIS 2947, at *16 (E.D. Pa. Feb. 23, 2003) (quoting *United States v. Dansker*, 537 F.2d 40, 60 (3d Cir. 1976)).

During direct examination, Vitillo testified that he sought to offer exculpatory information to the Government concerning the Reading Regional Airport project, but that the Government refused to give him an opportunity to offer such information. Defendants assert that during cross-examination of Vitillo, counsel for the Government improperly mentioned an off-the-record proffer made by Defendant and improperly indicated that Vitillo had refused to discuss the Defendants' billing practices regarding the Reading Regional Airport project. We are satisfied that the Government's cross-examination of Defendant Vitillo was not improper. It was directly related to the subject matter of the direct examination and it was directly related to the credibility of John Vitillo.

D. Government's Closing Argument

Finally, Defendants assert that counsel for the Government made improper reference to Vitillo's Fifth Amendment right not to testify during the Government's rebuttal of Vitillo's closing argument. Under the invited response doctrine, "a prosecutor's improper comments will not be cause for a new trial if they were a 'reasonable response to improper attacks by defense counsel,' and they were defensive in nature." *United States v. Massanova*, Crim. Nos. 98-631-

01, 98-631-02, 1999 U.S. Dist. LEXIS 14932, at *45 (E.D. Pa. Sept. 21, 1999) (quoting *United States v. Walker*, 155 F.3d 180, 186 n.5 (3d Cir. 1998)); *see also United States v. Pungitore*, 910 F.2d 1084, 1126 (3d Cir. 1990) ("The doctrine teaches that where a prosecutorial argument has been made in reasonable response to improper attacks by defense counsel, the unfair prejudice flowing from the two arguments may balance each other out, thus obviating the need for a new trial."). The Third Circuit has "generally found the invited response doctrine to be applicable only in instances where the prosecution team was attacked for reasons unsupported by the evidence at trial." *United States v. Dispoz-O-Plastics, Inc.*, 172 F.3d 275, 285 (3d Cir. 1999). A court must weigh the impact of the prosecutor's remarks and consider defense counsel's statement. *United States v. Young*, 470 U.S. 1, 12-13 (1985) (explaining that "if the prosecutor's remarks were 'invited,' and did no more than respond substantially in order to 'right the scale,' such comments would not warrant reversing a conviction").

Here, the Government's statement during its rebuttal argument falls within the ambit of the invited response doctrine. During the Defendants' closing argument, counsel suggested that the Government did not play a certain tape recording of Defendant Vitillo and one of his employees because it contained exculpatory evidence.[5] They, in effect, wanted the jury to infer that the Government intentionally avoided offering evidence that would have helped Defendants. In response, the Government argued to the jury that it did not want to introduce the tape recording because it might have permitted the jury to hear statements from Vitillo without an opportunity to cross-examine the Defendant about his statements. The comments of the AUSA were proper as a fair and invited response to the Defendants' attack on the Government's case.

[5]We again note that Defendants point to no trial transcript in support of their Motion.

United States v. Gambino, 926 F.2d 1355, 1365-66 (3d Cir. 1991) (citing *United States v. Robinson*, 485 U.S. 25, 33 (1988)). The Government's rebuttal "did no more than refute what was an obvious inference" from Defendants' closing argument.[6] *Pungitore*, 910 F.2d at 1127. The Government's statement in its rebuttal does not require a new trial.

An appropriate Order follows.

[6]Even if the invited response doctrine were not applicable, the evidence of Defendants' guilt in this case is overwhelming, "which further mitigates the possibility that the jury was prejudiced by the prosecutor's improper comment." *Werts v. Vaughn*, 228 F.3d 178, 200 (3d Cir. 2000). Moreover, the Court protected against any resulting prejudice by giving the jury an appropriate limiting instruction.

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ORDER

AND NOW, this 29th day of April, 2005, upon consideration of Defendant John Vitillo, Vitillo Corporation, and Vitillo Engineering, Inc.'s Motion for a new trial pursuant to Federal Rule of Criminal Procedure 33(a) (Doc. No. 79, Crim. No. 03-555) and the Government's response thereto, it is ORDERED that Defendants' Motion is DENIED.

IT IS SO ORDERED.

BY THE COURT:

S:/R. Barclay Surrick, Judge